TABLE OF CONTENTS.

	PAGE.
STATEMENT OF CASE.	1
Act of Congress	2
Act of N. Y. legislature	3
Plaintiff's situation before passage of said acts	4
Plaintiff's situation after passage of said acts	5
History of litigation	7
Constitutional question involved	9
How question raised	10
ASSIGNMENT OF ERRORS.	11
FIRST POINT	12
Plaintiff established three contracts (within contract clause of federal constitution):	
(1) Grant from Benson to N. Y. City	12
This grant a contract under federal decisions	14
This grant a contract under state decisions	15
Plaintiff a party to this contract	16
(2) Grant from Poillon to N. Y. City	16
Non-recordation of this grant immaterial	17
Poillon's grant to railroad company	18
Railroad company not a purchaser for value	20
Railroad company not a purchaser in good faith	20
Possession of railroad companies not adverse	24
(3) Contract subsisting among Poillon's grantees	24

PAGE.

SECOND POINT 28
Obligation of said contracts precludes erection of elevated railroad in Fourth Avenue:
(1) Construction of said contracts in elevated railroad cases 28
(2) Same construction applicable to case at bar..... 29
Viaduct in case at bar is improper street use..... 30
Alleged distinctions between case at bar and elevated railroad cases 31
(3) Construction may not be changed by state courts..... 35
THIRD POINT 39
Act in question impairs obligation of said contracts.
FOURTH POINT 44
Act in question directs taking of property without due process of law.
FIFTH POINT 47
If act declared unconstitutional, no inequitable results will ensue.
SIXTH POINT 49
Judgment should be reversed.
APPENDIX I..... 51
Extract from River & Harbor act of 1890.
APPENDIX II..... 52
Chapter 339 of N. Y. Laws of 1892.
APPENDIX III..... 74
Quotation from Lahr case (104 N. Y. 268).
APPENDIX IV..... 76
Lewis case (162 N. Y. 202).
APPENDIX V..... 100
Fries case (169 N. Y. 270).
APPENDIX VI. 120
Keirns case (173 N. Y. 642).

SUPREME COURT OF THE UNITED STATES.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY, AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of the State of New York, to review a judgment entered upon a decision of the Court of Appeals, which had reversed a judgment in the plaintiff's favor, and dismissed his complaint.

The federal question raised below and here is the constitutionality of an act of the New York legislature, passed April 19, 1892 (Ch. 339), which authorized the building and operation of an elevated railroad on Fourth or Park Avenue, in the City of New York, without compensation to abutting owners.

In the City of New York there is a railroad running from the Grand Central Station, at 42nd Street, northward along Fourth Avenue to the city limits, and beyond. This railroad is owned by the defendant the New York and Harlem Railroad Co., and is operated by the defendant the New York Central and Hudson River Railroad Co. under a lease from the first-named corporation (Record, original page 23). This railroad crosses the Harlem River, at the northern end of Manhattan Island (about 135th Street), on a bridge.

In 1890 Congress enacted a statute (the River and Harbor Act), in which there was a provision directing the Secretary of War to cause the bridges over the Harlem River to be replaced, at the expense of the owners, by other bridges, which should be at least 24 feet above the high water of spring tides (U. S. Stats. at Large, vol. 26, p. 437). The full text of this provision is printed in Appendix I. (p. 51) of this brief. The material portion is as follows: "The Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War."

The passage of the above act required a change

in the grade of the defendants' railroad in order to meet the grade of the new bridge over the Harlem River. The act provided, as appears above, that the change should be made as soon as the necessary legislation could be obtained to authorize a change in the approaches to the bridge.

The necessary legislation was supplied by the New York legislature in a statute passed in 1892 (Laws 1892, Ch. 339). The constitutionality of this statute is the sole question which the plaintiff in error presents to this court for decision. The full text of the statute is printed in Appendix II. (p. 52) of this brief. The legislature provided in this statute for a much more extensive change in the defendants' railroad than was necessary merely to cross the new bridge. For the purposes of the bridge, a change in grade, commencing at 129th Street, and running northward, would have sufficed.

Taylor *v.* N. Y. & Harlem R. Co., 27 App. Div. 190, 199-200.

But the act (§ 1) directed that the change in grade should commence at about 106th Street, and it prescribed minutely just how high the new grade should be. Prior to this time the railroad, going northward from 106th Street, ran on a stone viaduct, which gradually descended until it coincided with the surface of the ground at 115th Street (§ 2). North of this point it ran in a depressed cut or excavation along the centre of Fourth Avenue to the Harlem River (§ 3). The act (§ 4) directed that from 112th Street northward the tracks of the defendants should be elevated upon a "viaduct structure of iron or steel," which should be at a clear height of not less than 14 feet above the surface of the pavement. The act also provided (§ 13) for the appointment of a pub-

lic board, consisting of five members, who were "to execute, direct, and superintend" the work.

This board was appointed, and did its work, and in 1897 the defendants' trains began to be operated on the new viaduct (Record, p. 24).

The plaintiff is the owner of a five-story brick building at the northwest corner of Fourth Avenue and 115th Street, having a frontage of about 77 feet on the avenue (Record, p. 22). He viewed the erection of the above-mentioned viaduct with much dismay, for the citizens of New York are thoroughly acquainted with elevated railroads and with their effects upon adjoining properties. Prior to 1892, the railroad in front of the plaintiff's property ran in the old cut or excavation already mentioned, which, commencing at the south line of the plaintiff's premises, attained at the north line to a depth of 5½ feet below the surface of the avenue (Record, p. 23). This cut was bordered by masonry walls about 3 feet in height, so that trains running in the old cut were hidden to the depth of 3 feet at the south line, and 8½ feet at the north line, of the plaintiff's lot. The trains were thus largely out of sight and hearing, and the noise was largely deadened by the sides of the cut and by the masonry walls. The vacuum left behind the passing trains caused a draught of air into the cut, whereby the smoke, vapors, cinders, and dust from the locomotives were, to a certain extent, drawn back into the cut itself. The privacy of the plaintiff's apartments was not invaded; the view of and from his premises was not obstructed; there was no vibration of the houses resulting from passing trains; and his light and air and other easements were not seriously affected. The witnesses all agreed that this situation, while not altogether ideal for the abutting owners, was at least tolerable (Record, pp. 38, 65).

But the changes made pursuant to the act of 1892, have resulted in an entirely different situation. The railroad of the defendants, consisting of four tracks, is now operated upon a lofty metallic viaduct, supported by three rows of columns extending along the avenue. Six of these columns are directly in front of the plaintiff's premises. The height of the viaduct is 31 feet, and the width is 59 feet. The roadbed of the viaduct is solid, and rests upon huge solid girders extending along the avenue from column to column, the height or vertical dimension of these girders being 7 feet 4 inches (Record, p. 24). Every day about 500 trains, some of which are 18 cars in length, are run over this viaduct at a speed which sometimes reaches 25 miles per hour (Record, pp. 79, 80).

These conditions are unsurpassed for the production of *noise*. As descriptive of the phenomenon, the word noise seems tame and inadequate. The metallic viaduct constitutes a resonator of the very first order. On this resounding and vibrating roadbed the trains thunder by, day and night, at intervals of less than three minutes. You hear first a distant rumble, which increases in a steady crescendo till it becomes a deafening roar that cannot be matched outside of pandemonium. This noise needs to be heard to be appreciated. Verbal descriptions are pale and colorless (Record, pp. 41, 60, 65). One truthful, though ungrammatical, witness, a tenant of the building, said (Record, p. 44): "The noise is something so that you cannot stand it hardly. You cannot hear a word said in my place when a train is going by and for some time before it reaches there, and if you are talking to anybody, you have got to stop and wait until the train goes by." It is almost needless to add that this noise, besides interrupting conversation (Record, pp. 37, 41, 44, 60), prevents and disturbs sleep (Record, pp. 37, 39).

The locomotives, which pass just above the fourth story windows of the plaintiff's premises (Record, p. 65), belch forth smoke, steam, noxious fumes, dust, cinders, and dirt (Record, pp. 37, 39, 41, 44, 45, 60, 65, 81). These penetrate into the plaintiff's building. A tenant of the building said (Record, p. 41): "Everything in the house gets all black flecked if we leave them out any length of time. Even the bedding is all covered with little black flecks. On Saturday last we had some things out on the fire-escape, some celery, and the black flecks was ground into the celery." The cinders vary in size from minute specks up to large peas. From the fact that they come from the blast furnace of express locomotives, it may easily be inferred that these cinders are sometimes hot.

As already said, the viaduct is 59 feet wide, the roadbed is solid (Record, p. 24), and the top of the structure is just above the level of the plaintiff's fourth-story windows (Record, p. 65). Naturally, the structure itself and the passing trains obscure the plaintiff's light (Record, pp. 37, 60). The steam emitted by the engines reflects the light through the windows in flashes (Record, p. 65). This phenomenon is very familiar to the occupants of buildings along the line of the elevated railroads in New York City, and is as annoying as it is common.

The privacy of the plaintiff's rooms looking on Fourth Avenue "has been entirely destroyed unless you close the window and cover it up with a heavy shutter" (Record, p. 65). This loss of privacy causes complaints among the tenants (Record, p. 38).

The view of and from the abutting premises is destroyed, and the circulation of air thereto is impaired.

The operation of the trains causes vibration in the neighboring dwellings (Record, pp. 38, 60, 65).

After a rain, the structure drips for hours, and these drippings, after percolating through the oil and refuse of the roadbed, are injurious to the clothing of persons in the avenue (Record, p. 65).

The above effects of the operation of the viaduct prevent the abutting premises from being rented (Record, p. 37), cause reductions in rent (Record, pp. 40, 42), and drive away tenants (Record, p. 43).

To a property owner who is under the heavy and continuous drain of taxes and interest on mortgages, the erection of a railroad viaduct which drives his tenants away, is an event which spells ruin. The plaintiff, confronted with this situation, not unnaturally sought a legal remedy, and he brought this action to recover his damages for the past trespasses, and to obtain an injunction against the continuance of them in the future. The plaintiff supposed, and all the rest of the world supposed with him, that in the State of New York the law on this subject was absolutely settled. In the elevated railroad cases, numbering tens of thousands, the courts of New York had held that the construction and operation of an elevated railroad in a public street was a trespass upon the rights of the abutting owners, entitling them to relief. The plaintiff saw this elevated railroad in front of his windows, and he was unable to understand why the above rules of law did not apply to his case.

The first results were encouraging. Before the plaintiff's case was tried, an action brought by one of his fellow-plaintiffs, who owned property not half a block away, had come to trial, had resulted in a judgment in favor of the plaintiff, and

this judgment had been unanimously affirmed by the Court of Appeals.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202.

This decision is printed in Appendix IV. (p. 76) of this brief.

By this decision it was supposed that all possible doubt as to the defendant's liability was removed. Accordingly, the plaintiff prosecuted his action to trial. The only controverted question of fact at the trial was the amount of the plaintiff's damages. The court determined that these damages were very substantial, and gave a judgment for the plaintiff in the usual form awarded in elevated railroad actions, namely, for $1,984.23, as rental damages and costs, and for a conditional injunction, to be avoided by the payment of $3,000 fee damages (Record, p. 30). The value of the plaintiff's property being $29,750 (Record, p. 88), and there being a mortgage of $25,000 upon it (Record, p. 63), the plaintiff's equity ($4,750) is less than the damages found by the court. In other words, the judgment established that the plaintiff's entire interest in the property had been wiped out. This judgment was affirmed by the Appellate Division (Record, p. 127), and by this affirmance all controversy over the *amount* of the plaintiff's damages was set at rest; for under the constitution of New York the jurisdiction of the Court of Appeals in civil cases is limited to the review of questions of law.

N. Y. Const., Art. 6, § 9.
N. Y. Code Civ. Pro., § 191, subd. 3.

But before the plaintiff's case arrived in the Court of Appeals, that court, in the case of another abutting owner, had overruled its decision

made not two years before in the Lewis case, and, by a vote of four to three, had declared that the erection of the viaduct in question was a case of *damnum absque injuria*, which gave no right of action to any one.

Fries *v.* N. Y. & Harlem R. Co., 169 N. Y. 270.

This decision is printed in Appendix V. (p. 100) of this brief.

This decision was not made without a strong dissent, and one of the dissenting judges subsequently said in another case: "I regret the result reached * * * as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations."

Keirns *v.* N. Y. & Harlem R. Co., 173 N. Y. 643.

The opinion in which this was said, is printed in Appendix VI. (p. 120) of this brief.

When the case at bar arrived in the Court of Appeals, the plaintiff attempted to show that the Fries decision did not apply to him, because the corner-stone of the reasoning in that decision was that the act of 1892 was constitutional, whereas the plaintiff claimed, and had always claimed that as to him this act was wholly unconstitutional. The plaintiff then proceeded to argue the question of constitutionality. (See Record, p. 1c, and 173 N. Y. 550). The Court of Appeals, however, in deciding the case, treated the constitutional question somewhat cavalierly, merely saying that it had been considered and passed upon in the Fries case (Record, pp. 169-70). But in the Fries case this question was not raised by the record, and had not been argued. This is stated in so many words in the opinion of

O'BRIEN, J., who, speaking of the question of the constitutionality of the act, says (169 N. Y. 277): "It is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now, as this court has recently held (*Dodge* v. *Cornelius*, 168 N. Y. 242). The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it."

It is somewhat bewildering to be told in the Muhlker case that the constitutional question "was considered and passed upon" in the Fries case, and yet to be told in the Fries case that this question was neither presented by the record nor argued by counsel. The Court of Appeals has always declared heretofore that it would not pass upon the constitutionality of a statute unless the question were unavoidable for the determination of the appeal.

Matter of Attorney-General, 155 N. Y. 442.
Demarest *v.* Mayor, 147 N. Y. 203.
Curtin *v.* Barton, 139 N. Y. 505, 510-11.

The Manner in Which the Constitutional Question Is Raised.

The question is clearly presented on the record. The plaintiff, it is true, made no reference to the statute in his complaint. His reason was that the statute was matter of defence, and to anticipate a defence would have been bad pleading. When the defendants set up the statute in their answer, the plaintiff was not required, and would not have

been permitted, to serve a reply, alleging that the statute was unconstitutional. Under the rules of pleading existing in New York, a reply is allowed only where the answer sets up a counterclaim (Code Civ. Pro., § 514), and there was no counterclaim here. In such a case, "an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires" (Code Civ. Pro., § 522). This is a statutory replication, and "secures to the plaintiff the benefit of every possible answer to the defence made by way of new matter, not constituting a counterclaim, as fully as though it were alleged in the most perfect manner."

Arthur *v.* Homestead Fire Ins. Co.,
78 N. Y. 462, 467.

Upon the trial, therefore, the plaintiff was at liberty to claim, and did claim, that the statute was a nullity. And it was so held by the trial court, for the judgment in favor of the plaintiff could not have been given, except upon the assumption that the defence in question was bad, and the statute void. The Appellate Division, in affirming the judgment, acted upon the same assumption. In the Court of Appeals the plaintiff again claimed that the statute was unconstitutional, and the judgment of that court shows that he did so (Record, p. 1c). It is well settled that a federal question is sufficiently presented, if it was raised, even for the first time, in the highest court of the state.

Rothschild *v.* Knight, 184 U. S. 334.

ASSIGNMENT OF ERRORS.

The error of which the plaintiff complains is

that the New York Court of Appeals held Chapter 339 of the New York Laws of 1892 to be constitutional, whereas the plaintiff contends that the said act is unconstitutional (1) in that it impairs the obligation of a contract, and (2) in that it directs the taking of property without due process of law.

FIRST POINT.

The plaintiff established three contracts within the contract clause of the federal constitution.

In discussing the question whether the obligation of a contract has been impaired, the plaintiff is called upon to show in the first place that there is a contract. On this point the plaintiff is under no embarrassment, for he is able to point out, not simply one contract, but three. We take these up in their order.

(1) The Grant from Benson to the City of New York.

The discussion of these contracts carries us back to the year 1825. We beg leave to emphasize this date, and to call particular attention to the fact that it was prior to the incorporation of either of the defendants. The New York and Harlem Railroad Co. was incorporated in 1831 by New York Laws 1831, Ch. 263 (Record, p. 81). Hence its rights, and those of its lessee, the other defendant, are not, and cannot be, superior to a contract made in 1825.

In 1825 the locality in question consisted of farm lands. A prominent landmark was a country road,

which appears on the maps of the period as the "Old Harlem Road." This road ran in a northeasterly direction, and crossed Fourth Avenue diagonally in front of the plaintiff's premises. (See description of Benson and Vredenburgh Map, pp. 51-2 of Record, and description of Map of Third Avenue Tract, pp. 101-2). The road is represented on the three maps constituting pp. 109, 111, and 113 of the Record (opposite pp. 63, 64, and 65, respectively, of the Transcript).

South of the "Old Harlem Road" the land was owned by one Benson. By a deed (Record, pp. 49-50), dated and recorded in 1825, Benson conveyed the portion of Fourth Avenue lying south of the "Old Harlem Road" to the City of New York. The strip thus conveyed was 100 feet wide, was bounded on the north by the centre line of the "Old Harlem Road," and extended southerly several hundred feet—considerably beyond the south line of the plaintiff's property. The conveyance was not a fee simple absolute, but was stated to be "in trust, nevertheless, that the same be appropriated and kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be."

Benson's title to this strip of land is conceded on both sides, for the defendants also put in evidence a deed from Benson (Record, pp. 85-6). This deed assumed to convey to the New York and Harlem Railroad Co. a strip of land 24 feet wide in the centre of the avenue—being the same land which Benson had previously conveyed to the City of New York in 1825. The deed to the railroad company was dated in 1832 and recorded in 1835—which was ten years after the record of the aforesaid deed to the city. Under the recording act, therefore, the deed to the railroad company was

void. This elementary proposition will not be disputed, and we refer to the recording act merely to show that there was such a statute in force at the time.

N. Y. Rev. Laws of 1813, vol. 2, p. 406.
N. Y. Rev. Stats., vol. 1, p. 756, § 1.

Returning to the deed from Benson to the city, which is one of the contracts whose obligation, as we claim, has been impaired, it is well settled that the City of New York had due legal authority to take this deed.

Vail *v.* L. I. R. Co., 106 N. Y. 283, 287.
Hughes *v.* Bingham, 135 N Y. 347, 352.

The deed, therefore, was valid and binding, and being a grant or conveyance of land, it was an executed contract, and as such within the protection of the clause of the federal constitution which provides that no state shall pass any law impairing the obligation of contracts.

Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 136-7.
Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 656-7.
McGee *v.* Mathis, 4 Wall. (U. S.) 143, 155.
Farrington *v.* Tennessee, 95 U. S. 679, 683.

We have thus produced a contract which the federal courts will recognize as within the protection of the constitution. The New York courts also have repeatedly declared that the proceedings through which the streets of New York City have

been opened, amount to a *contract* with the abutting owners. The statute under which these streets exist, is Chapter 86 of the Revised Laws of 1813. That act provides (vol. 2, p. 414) that when lands in New York City are acquired for public purposes, "the said Mayor, Aldermen, and Commonalty of the City of New York shall become and be seized in fee of all the said lands. * * * in trust, nevertheless, that the same be appropriated and kept open for, or as part of, a public street, avenue, square, or place forever, in like manner as the other public streets, avenues, squares, and places in the said city are, and of right ought to be."

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 290, the court, construing the above clause of this act, said (of condemnation proceedings instituted thereunder): "Such proceedings created not only a valid trust in the city for the purposes expressed, which precluded it from authorizing any other use of the land acquired, than that expressly described in the statute (Cooley on Const. Limitations, 331), but also *constitute a contract between the public and the abutting owners severally,* by which the liabilities, rights, and interests of the respective parties are to be measured, and the enjoyment of their respective interests in the property (retained as well as acquired) regulated and determined."

The case just quoted was the second great case in the elevated railroad litigation. The same principle had been enunciated in the first case in that litigation, Story *v.* N. Y. El. R. Co., 90 N. Y. 122. In three places in the report of the Story case (pp. 160, 172, 177) it is laid down that the dedication of the streets of New York to a public use, amounts to a *contract,* which is written in the statute, and which is beyond the power of the legislature to impair.

The same rule was repeated in the third leading case involving the elevated railroads, Kane *v.* N. Y. El. R. Co., 125 N. Y. 164, 177.

Thus it is plain that under both the federal and the state decisions the deed under consideration is a *contract.* This deed, by its very terms, declares a trust. The statute under which it was given and accepted, also declares a trust. Thus Fourth Avenue, both by the dedication on the one side, and by the acceptance of the dedication on the other, was encumbered with a trust especially designed for the benefit of the abutting owners. These owners are beneficiaries under the trust, and entitled to enforce it in the courts. Thus in the Lahr case, 104 N. Y. 268, 291-2, it was said: "The covenant implied from the language of the statute, and the proceedings taken thereunder, was made with and intended for the benefit, among others, of abutting owners, and is a covenant which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title."

The same thing was said in the Story case, 90 N. Y. 122, 176, and in the Kane case, 125 N. Y. 164, 183.

Thus the plaintiff, as a *cestui que trust* under this trust deed, is a party to it, and entitled to enforce it. That the owner of property abutting on a public street has the right to enforce the public purposes for which the street was dedicated, is the rule of this court, and, so far as we are aware, of all courts.

U. S. *v.* Illinois Cent. R. Co., 154 U. S. 225, 238.

(2) The Grant from Poillon to the City of New York.

North of the "Old Harlem Road" already men-

tioned, the farm land belonged to one Poillon. By a deed (Record, pp. 50-1) dated in 1827, but not recorded, Poillon conveyed the portion of Fourth Avenue lying north of the "Old Harlem Road" to the City of New York. The strip thus conveyed was bounded on the south by the "Old Harlem Road," and extended northerly several hundred feet—considerably beyond the north line of the plaintiff's property. This conveyance also was not absolute, but "in trust that the same be left open as public streets for the use and benefit of the inhabitants of the said city forever."

The right of the plaintiff to enforce the trust created by the Poillon deed is clear; for he derives his premises by a regular chain of title from Poillon himself (Record, pp. 52-6).

The situation with reference to the Poillon deed is exactly the same as in respect to the Benson deed, with one exception, namely, that the Poillon deed was never recorded. The question now arises whether this fact makes any difference.

Very clearly it does not. A record is not necessary to the creation of a highway.

Driggs *v.* Phillips, 103 N. Y. 77.

What *is* necessary, is a dedication and an acceptance. The deed itself was a dedication, and there is evidence that the dedication was accepted; for the deed was produced from the custody of the Comptroller of New York City (Record, p. 50), in whose office all such deeds of cession are kept; and, moreover, we find that a resolution passed by the municipal authorities in 1832 refers to the avenue as "ground owned by the common council" (Record, pp. 102-3). In Matter of Hunter, 163 N. Y. 542, 548, it was said: "Any action by the common council showing a clear intention to recognize the strip of land in question as a street was

an acceptance of it as a public highway. * * * A resolution formally and in terms accepting the street was unnecessary, for any official act on the part of the common council which treated it as a street and showed an intention to adopt it as one of the public streets of the city would be sufficient."

But acceptance of the dedication, even if there were no evidence thereof, would be presumed. *Acceptance* is involved in *delivery*, and the deed is presumed to have been delivered and accepted at its date.

Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 352.
Foster *v.* Beardsley Scythe Co., 47 Barb. (N. Y.) 505.
Wilsey *v.* Dennis, 44 Barb. (N. Y.) 354, 359.

Moreover, acceptance of the deed is presumed from the beneficial nature of the grant.

Spencer *v.* Carr, 45 N. Y. 406, 410.
Munoz *v.* Wilson, 111 N. Y. 295, 303.

And this presumption applies to a dedication of land for public uses.

Child *v.* Chappell, 9 N. Y. 246, 257-8.

So far as concerns the dedication of the avenue by means of the Poillon deed, it is clear that the omission to record the deed is of no moment.

But the defendants also have a deed from Poillon (Record, pp. 82 *et seq.*) exactly similar to their deed from Benson; and the further question arises whether, by reason of the recording act, this deed from Poillon to the New York and Harlem Railroad Co., which was recorded in 1835, took prece-

dence over the deed from Poillon to the City of New York, which was not recorded.

It may well be doubted whether the recording act has any application to deeds of cession, creating public streets. Almost every deed conveying property bounded on a street, purports to convey a portion of the street, *i. e.*, to the centre line; but it has never yet been held that this fact affects in any degree the rights of the public.

In Matter of 39th Street, 1 Hill (N. Y.) 191, it appeared that the owner of certain land, over which 39th Street in New York City, as laid out on the city map, extended, conveyed a piece of land on the north side of the street to one Norton, bounding the land by the north side. Thereafter the said owner conveyed the fee of the street to John Jacob Astor, whose deed was recorded before that of Norton. The court held that the conveyance to Norton operated as a dedication of the street, and that the dedication was not affected by the prior recording of Astor's deed. The court said (p. 194): "It may be doubted, whether the recording statute could have any effect upon the right which had previously accrued to the public in consequence of the deed to Norton. * * * The grant to Astor, although it includes the land in the site of the street, plainly refers to and sanctions the commissioners' map, and thus manifests the assent of both grantor and grantee that the street, as it had been laid out under the act of 1807, should be a public street."

In the case at bar, the grant from Poillon to the railroad company also refers to and sanctions the map of the City of New York (Record, p. 81), filed by the commissioners appointed under N. Y. Laws of 1807, Ch. 115. Hence, the grant is directly within the rule of the above case.

But assuming, for the sake of argument, that the recording act does apply to deeds of cession,

it is easily shown that that fact does not aid the defendants in this case.

In order to get the benefit of the recording act, the New York and Harlem Railroad Co. must show a fulfilment of two requirements: (1) That it was a purchaser for a valuable consideration, and (2) That it was a purchaser in good faith.

N. Y. Rev. Laws of 1813, vol. 2, p. 406.
N. Y. Rev. Stats., vol. 1, p. 756, § 1.

The burden is upon the railroad company to prove both of the above propositions.

Westbrook *v.* Gleason, 79 N. Y. 23, 33.

Not only did the company fail to sustain this burden, but the evidence established the exact contrary of each of the above requisites.

(1) *The New York and Harlem Railroad Co. was not a purchaser for a valuable consideration.*

The consideration recited in the deed to the railroad company was nominal (Record, p. 83). But a valuable consideration, within the meaning of the recording act, means substantial value, and a nominal sum will not suffice.

Turner *v.* Howard, 10 App. Div. (N. Y.) 555, 559.

And the defendants failed to show by other proof that, as a matter of fact, any actual value was paid.

(2) *The New York and Harlem Railroad Co. was not a purchaser in good faith.*

This was specifically held by the Appellate Division in Fries *v.* N. Y. & Harlem R. Co., 57 App. Div. (N. Y.) 577. It appears from a number of considerations.

In the *first* place, the railroad company had notice from its own deed that Fourth Avenue had been dedicated as a public street. This deed conveyed property described as follows: "All that certain piece of land, situate, lying, and being in the twelfth ward of the city of New York, being part of one of the avenues laid out on the map of the city of New York, as the 4th avenue, and is included within a space of 24 feet wide running through the centre of said avenue" (Record, p. 83).

This recital was notice to the grantee of the facts recited.

Clapp *v.* Byrnes, 3 App. Div. (N. Y.) 284, 296; affd., 155 N. Y. 535.
Acer *v.* Westcott, 46 N. Y. 384.
Schwinger *v.* Hickok, 53 N. Y. 280, 285.
McPherson *v.* Rollins, 107 N. Y. 316, 322-3.
Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 274.

The recital was sufficient to put the railroad company upon inquiry as to the title to this land, described as part of one of the avenues of the City of New York. An obvious question was, Has this land ever been acquired by the city, by deed or otherwise? Five minutes' search in the Comptroller's office would have led an inquirer to the deed from Poillon to the city, and would have answered the question.

A party is chargeable with notice where the circumstances were such as ought reasonably to have

excited his suspicion, and led him to inquire; he is then presumed either to have made the inquiry and ascertained the facts, or else to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser.

Baker *v.* Bliss, 39 N. Y. 70, 74.
Cambridge Valley Bank *v.* Delano, 48 N. Y. 326, 340.
Reed *v.* Gannon, 50 N. Y. 345, 350.
Ellis *v.* Horrman, 90 N. Y. 466, 473.
Kingsland *v.* Fuller, 157 N. Y. 507, 511.
Sweet *v.* Henry, 175 N. Y. 268, 276.

One who purchases with notice, actual or constructive, of a defect in the title, is not a purchaser in good faith, and cannot claim the protection of the recording act.

Ring *v.* Steele, 4 Abb. App. Dec. (N. Y.) 68, 70.
Schutt *v.* Large, 6 Barb. (N. Y.) 373, 381.
Haywood *v.* Shaw, 16 How. Pr. (N. Y.) 119.
Jackson *v.* Page, 4 Wend. (N. Y.) 585, 591.
Dingley *v.* Bon, 130 N. Y. 607, 613-4.

In the *second* place, it was provided by the act of 1807 (Laws 1807, p. 275) that the commissioners' plans, surveys, and maps, made pursuant to that act, should be final and conclusive in respect to both the city and the owners of the lands within the boundaries of the streets, "and in respect to all other persons whomsoever." And the act was declared to be a public act (Laws 1807, p. 279). Hence the act itself, and the map filed pursuant thereto (Record, p. 81), were notice to the New

York and Harlem Railroad Co., that the land of which it was taking a conveyance was forever devoted to street purposes; and this notice was sufficient to put the company upon inquiry for the purpose of ascertaining what kind of a title the deed was transferring.

In the *third* place, the charter of the New York and Harlem Railroad Co. provided (N. Y. Laws 1831, Ch. 263, § 16), that the company was not to construct its railroad along any of the streets or avenues designated on the map of the City of New York, whether such streets or avenues should have been opened or not, without the consent of the city authorities. The company, in taking such a charter, manifestly had notice that its rights in Fourth Avenue were at all times to be subordinate to the rights of the City of New York.

In the *fourth* place, the agreement (Record, p. 116) of January 9, 1832, between the New York and Harlem Railroad Co. and the City of New York, which embodied an ordinance passed by the common council on December 22, 1831, distinctly recognized that Fourth Avenue was then in existence, that it was absolutely subject to the regulation and control of the city authorities, and that the railroad was to be there by sufferance only. Moreover, in the ordinance (Record, pp. 102-3) passed by the board of aldermen on January 20, 1832, which date was just two days after the date of the deed to the railroad company, the said company is "authorized to take possession of *the ground owned by the common council* over which the line of said railroad is ordered to be constructed." It can scarcely be conceived that the officers of the railroad company were ignorant of this ordinance and of the rights of the City of New York in Fourth Avenue. The two ordinances just above mentioned were in evidence in the Lewis case, 162

N. Y. 202, and the court said of them (p. 221): "The company *recognized the title of the city* by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson."

It may be well to add, that, as the defendants acquired no rights in Fourth Avenue by their deed, so also they have never acquired any by adverse possession. The fee of the avenue was and is in the City of New York, and the occupation of the defendants has always been under a license from the city (Record, pp. 102-3, 116). Possession under a license is never adverse.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202, 221.
1 Cyc. 1030.
Am. & Eng. Encyc. of Law (2d ed.), vol. 1, p. 794.

Moreover, no one can acquire title by adverse possession to any portion of a public street or highway.

Burbank *v.* Fay, 65 N. Y. 57, 69.
St. Vincent Orphan Asylum *v.* Troy, 76 N. Y. 108, 114.
Bliss *v.* Johnson, 94 N. Y. 235, 241.
Driggs *v.* Phillips, 103 N. Y. 77, 82-3.

(3) The Contract Subsisting Among Poillon's Grantees.

It is a principle of law existing in the State of New York, and apparently in every other state in the union, that where the owner of land lays it off into streets, and files a map representing the streets, and then makes conveyances of parcels of land, describing them as bounded on the said streets, these acts constitute an irrevocable dedication of the streets represented on the map,

whether they have ever been accepted by the public authorities or not; and this dedication is binding, not only upon the grantor, but upon all persons taking such conveyances from him, and amounts to an implied contract among all such persons that the strips of land represented on the map as streets shall remain such perpetually, with all the incidents legally pertaining thereto.

Taylor *v.* Hopper, 62 N. Y. 649.
White's Bank of Buffalo *v.* Nichols, 64 N. Y. 65, 73.
Matter of Eleventh Avenue, 81 N. Y. 436, 446.
Matter of Ladue, 118 N. Y. 213, 219-20.
Matter of Village of Olean *v.* Steyner, 135 N. Y. 341, 345.
Cunningham *v.* Fitzgerald, 138 N. Y. 165, 170.
Lord *v.* Atkins, 138 N. Y. 184, 190-1.
Holloway *v.* Southmayd, 139 N. Y. 390, 404-5.
Matter of Adams, 141 N. Y. 297, 300.
Matter of St. Nicholas Terrace, 143 N. Y. 621.
Haight *v.* Littlefield, 147 N. Y. 338, 341-2.
13 Cyc. 455.
Am. & Eng. Encyc. of Law (2d ed.), vol. 9, p. 57.

Thus in White's Bank of Buffalo *v.* Nichols, 64 N. Y. 65, 73, it was said: "When land is granted bounded on a street or highway, there is an implied covenant that there is such a way, that so far as the grantor is concerned, it shall be con-

tinued, and that the grantee, his heirs and assigns shall have the benefit of it."

The application of this rule of law to the case at bar may be easily shown.

In 1811 the commissioners who had been appointed by the legislature (N. Y. Laws 1807, Ch. 115) for the purpose of laying out the northern portion of Manhattan Island into streets and avenues, filed a map, which officially established the streets and avenues of Harlem, and represented Fourth Avenue as 100 feet wide. The portion of this map which embraces the locality in suit, was put in evidence (Record, p. 81) and constitutes p. 109 of the Record.

In 1826 some one (presumably Poillon) caused the land lying north of the "Old Harlem Road" to be surveyed, and a map thereof to be prepared and filed in the office of the Register of New York County (Record, p. 51). This map was entitled "Map of property formerly belonging to S. Benson and B. Vredenburgh, deceased, in the twelfth ward of the City of New York." It represented Fourth Avenue and the cross streets as they were established by the map of the City of New York, referred to just above, and it also represented lots laid off and numbered (Record, pp. 51-2).

In June, 1827, Poillon conveyed a portion of the premises in suit to one Stout (Record, p. 52), and another portion to one Perry (Record, p. 54), both portions being described as lots on the Benson and Vredenburgh map. Both of said deeds recognize and name Fourth Avenue. From Stout and Perry the plaintiff derives title (Record, pp. 53, 56). It should be added that the deeds to Stout and Perry conveyed no portion of the bed of Fourth Avenue, but carried title only as far as the side of the avenue; for at this time Fourth Avenue was only a street on paper, and in the City of New York,

under such circumstances, deeds carry title no further than to the side of the street.

City of Buffalo *v.* Pratt, 131 N. Y. 293, 297.

Graham *v.* Stern, 51 App. Div. (N. Y.) 406, 409-10; affd., 168 N. Y. 517.

In July, 1827, Poillon, who still retained title to the bed of Fourth Avenue, conveyed the same to the City of New York, in trust for street purposes (Record, pp. 50-1). The land conveyed was described with reference to the Benson and Vredenburgh map.

In 1832 Poillon assumed to convey to the New York and Harlem Railroad Co. a strip of land, 24 feet wide, lying in the centre of Fourth Avenue (Record, pp. 82-3). This strip was described with reference to the map of the City of New York.

All of the above-named deeds given by Poillon specifically named Fourth Avenue and specifically recognized it as one of the city streets.

It thus appears that the plaintiff, the defendants, and the City of New York all claim under Poillon as a common source of title, and all have deeds from him; and that all of these deeds specify Fourth Avenue as a public street, and refer to maps, then on file, on which the avenue appears as one of the streets of New York City.

Hence the rule of law above stated applies with full force and effect to the case at bar. The plaintiff, the defendants, and the City of New York are all under an implied contract that Fourth Avenue shall remain a public street perpetually, with all the incidents attached to such a street by the New York law.

The contract clause of the federal constitution

is applicable to implied as well as to express contracts.

Fisk *v.* Jefferson Police Jury, 116 U. S. 132.

SECOND POINT.

The obligation of these contracts precludes the erection of an elevated railroad in Fourth Avenue.

We come now to a construction of the various contracts pointed out above, for the purpose of determining their obligation.

(1) The Rule of Property Declared in the Elevated Railroad Cases.

In the elevated railroad cases, the New York courts declared that the effect of the several trusts created by the above contracts was to dedicate the streets of New York City to street purposes alone, and that the construction, maintenance, and operation of an elevated railroad in one of the said streets was not a legitimate street purpose, but, on the contrary, was a violation of the trust under which the street was held by the city.

In Williams *v.* Brooklyn El. R. Co., 126 N. Y. 96, 100, it was said: "The *Story* case and those which have followed it have settled the doctrine that the placing of an elevated railroad structure in a city street is inconsistent with its character as an open public street, and in the absence of the consent of the abutting owners to the erection, violates their rights as such, notwithstanding the title to the soil of the way is in the muncipality

and although the railroad company in erecting the structure acted under both legislative and municipal authority."

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288, it was said: "An elevated railroad, in the streets of a city, operated by steam power and constructed as to form, equipments, and dimensions like that described in the *Story* case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation, for the injury inflicted upon the property of abutting owners."

And in Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 178, it was said: "The authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, * * * and in respect to lands acquired under the act of 1813 violates the trust for which such lands are held for public use."

(2) Does this Rule of Property Apply to the Case at Bar?

Whether any given structure in a street is inconsistent with the public character of the street, is a question of fact.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 173.

The decision of the trial court determined that the structure of which the plaintiff complains, was inconsistent with the public nature of the street. This finding of fact was affirmed by the Appellate Division, and thus became final; for the Court of Appeals has no power to review facts.

N. Y. Const., Art. 6, § 9.
N. Y. Code Civ. Pro., § 191, subd. 3.

Whatever was a question of fact in the state court, is a question of fact in this court.

Eastern Building & Loan Assn. *v.* Ebaugh, 185 U. S. 114, 121.

And this court will not re-examine the evidence, but will take the facts as found in the court below.

Egan *v.* Hart, 165 U. S 188.
Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 103.
Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83.

It therefore follows that the viaduct in front of the plaintiff's premises is a use inconsistent with the public character of the street, just as much as the other elevated railroads in New York City, and is a taking of the property of abutting owners, and a violation of the contracts by which they are protected, just as in the case of the other elevated roads.

To sum up the situation, we find an early statute, passed in 1813, declaring that the streets of New York City are held by the city in trust for certain public purposes. We find the highest court of the state steadily holding, for a score of years, that this trust precludes the erection of an elevated railroad. We find thousands of cases decided by the lower courts of the state in accord-

ance with the law as thus laid down. We find tens of thousands of conveyances made upon the faith of this rule of property, the purchasers paying their money and taking their deeds in the confident assurance that whatever might befall them in the way of taxes and assessments, they would be free for all time from the danger of having an elevated railroad erected in front of their houses. And we find the Court of Appeals holding, in the first of the Fourth Avenue viaduct cases, that the elevated railroad decisions were fully applicable to the situation there presented.

Lewis *v.* N. Y. & Harlem R. Co., 162 N. Y. 202.

When the learned judges of that court subsequently changed their minds, although they agreed that the elevated railroad cases were distinguishable, yet they seem to have found much difficulty in pointing out the distinctions.

I.

One "distinction" was said to be the fact that in the elevated railroad cases there was no change in the street grade, while in the case at bar "we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks" (169 N. Y. 277-8). But the learned judge who said this was mistaken. There was no change in the grade of Fourth Avenue. The statute (§ 3) expressly provided that the space under the viaduct should be paved "*in accordance with the grades of Park Avenue, as now established.*" It would seem, therefore, that this distinction collapses.

II.

Another "distinction" was said to lie in the fact that the elevated railroad companies were only *permitted* by the legislature to erect their structures, while the defendants here were *commanded*. "In one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did" (169 N. Y. 284-5). In other words, the legislature having commanded the defendants to impair the obligation of a contract, that command legalized the whole transaction! This "distinction" assumes the constitutionality of the command, whereas that is precisely the question at issue.

III.

Yet another "distinction" was that in the elevated railroad cases the abutting owners had never consented to the construction of the railroad, while in one or two of the Fourth Avenue viaduct cases the railroad companies had acquired the right, as against the plaintiff, to operate their railroad, this right being derived through a deed from the plaintiff's predecessor in title (169 N. Y. 278-9). This distinction did exist in some of the viaduct cases. But it does not exist in the case at bar; for while the defendants have a deed from Poillon (Record, p. 83), this deed was given some time after Poillon had conveyed the fee of the street to the City of New York (Record, pp. 50-1), and also after he had conveyed the abutting property to the plaintiff's predecessors in title (Record, pp. 52, 54). After these conveyances Poillon retained in himself no right, title, or interest upon which his deed to the railroad company could operate; and this deed was consequently void.

IV.

Still another "distinction" was stated to be that in the elevated railroad cases "no attempt was made by the state to improve the street for the benefit of the public," while in the case at bar "the change was made for the public benefit as well as for that of the railroad" (173 N. Y. 556). This "distinction" depends upon the fact that the railroad in Fourth Avenue was first constructed on the ground, and then, to "improve" the avenue, was elevated upon a viaduct, while the other elevated railroads were built upon a viaduct in the first instance. But what difference can this make, when we remember that long before *any* railroad was built in Fourth Avenue, that strip of land became affected with a trust which excluded *elevated* railroads from that avenue for all time? The trust was never broken until this viaduct was erected; for it is the settled law of New York that a railroad operated (whether by steam or otherwise) *on the ground*, where the fee of the ground is in the municipality, is a legitimate street use.

Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505.

The effect of this "distinction" is to leave property owners in New York City absolutely at the mercy of the legislature. Every avenue in the city (except Fifth Avenue) has upon it a surface railroad of some kind. The fee of the streets being in the city, these railroads, under the case just cited, are all entirely lawful. Considering the dense throngs that travel the streets of New York City, and the innumerable accidents that happen, it would unquestionably be an improvement, from a public point of view, to have all these railroads elevated, so as to abolish grade crossings. Can

the legislature in all such cases "improve the street for the benefit of the public" by elevating the railroad upon a viaduct? If so, a simple and obvious device has been discovered by which to impair the obligation of the trust to which the streets of New York City were dedicated. The method is simply this: First place your railroad on the surface of the street; and then elevate it. Under the Fobes case, no property owner can complain of the first step, and under the Muhlker case, no one can complain of the second. And so indirectly the legislature has accomplished what it could not do directly.

The courts have always declared emphatically that what the legislature cannot do directly, it cannot do indirectly.

Forster *v.* Scott, 136 N. Y. 577, 584.
People *v.* Coler, 166 N. Y. 1, 19.
Gilman *v.* Tucker, 128 N. Y. 190, 204.

Nor can the legislature violate the constitution, and redeem the violation by the claim that it was done "for the public benefit." It would be a curious result, if a state legislature were at liberty to pass a law impairing the obligation of contracts, provided only that this were done with the virtuous intent of "benefiting the public." The repudiation of contract obligations is quite usually sought to be justified by the plea of "the public benefit;" but the constitution of the United States may not be nullified in so simple and easy a fashion.

Minnesota *v.* Barber, 136 U. S. 313, 319.
Brimmer *v.* Rebman, 138 U. S. 78, 81.

The question is not whether the work is for the

public benefit. All railroads are for the public benefit, and it is only on this ground that the right of eminent domain is granted to them. Yet they must pay for what they take. Can private property be taken for public benefit without compensation? If not, then this assertion does not sustain this statute. The real question is whether the structure is a part of the use to which the strip of land called a street was devoted by the deeds and proceedings which vested title to it in the city as trustee. If it is such a use of the street, then there is *damnum absque injuria*. If not, there is a taking of the plaintiff's property by the building and operation of the elevated railroad structure, and the statute which authorizes this to be done without compensation, violates the contracts in evidence, and takes property without due process of law. This cannot be done by a statute which "directs" any more than by one which "authorizes." The statute was but an enabling act in any form. The Court of Appeals has construed this act to authorize the taking without compensation. The act is what that court says it is. Therefore, it violates the constitution.

(3) Can this Rule of Property be Changed by the State Courts?

The Story case, construing the act of 1813, and declaring that the trust provisions of that act would not permit the erection of an elevated railroad in a public street, was decided in 1882 (90 N. Y. 122). The Lahr case, re-iterating this rule, was decided in February, 1887 (104 N. Y. 268). This construction of the act of 1813 became a part of the act itself. Upon the faith of the law as thus expounded, the plaintiff purchased a part of his property in June, 1887 (Record, p. 54), and the remaining part in 1888 (Record, p. 56). And now

he finds that this rule of property on which he relied, a rule laid down and re-iterated by the New York courts in ten thousand cases, was but a broken reed, and that the calamity which the courts had so often declared should not happen to him, has happened.

Is the New York Court of Appeals at liberty to change its construction of the act of 1813, after the plaintiff has purchased property upon the faith of that construction? By this purchase the plaintiff became a party to the covenant described in the Lahr case as a covenant "which runs with the land and inures to the advantage of each successive grantee as he succeeds to the title" (104 N. Y. 291-2). The authorities hold that the construction of a statute by a state court, so far as contract rights acquired under it are concerned, becomes as much a part of the statute as if embodied in it, and that a change of construction is utterly ineffectual to impair those rights. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 206.

In Louisiana *v.* Pilsbury, 105 U. S. 278, it appeared that in 1852 the legislature of Louisiana passed an act authorizing the City of New Orleans to issue certain bonds. This act, under the construction then put upon the state constitution by the highest court of the state, was constitutional; and the bonds were issued accordingly. In 1876 the Louisiana legislature passed another act, which need not be particularized, but which this court held to be a flagrant impairment of the obligation of the bonds. One of the bondholders having sought a remedy by mandamus, the Supreme Court of Louisiana changed its construction of the

Louisiana constitution, and held that the act of 1852, under which the bonds had been issued, was unconstitutional. A writ of error was then sued out of this court, and the question arose which of the two constructions placed upon the Louisiana constitution by the highest court of that state, was binding. On that question this court said (105 U. S. 294): "The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it. *Christy* v. *Pridgeon*, 4 Wall. 196, and *Shelby* v. *Guy*, 11 Wheat. 361. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglass* v. *County of Pike*, 101 U. S. 677, 687. 'The true rule,' he observes, 'is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a

statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.' "

In all essential particulars, the above case is on all fours with the case at bar. In both cases the state legislature passed an act,—in the Louisiana case for the issuance of bonds by a municipality, and in the New York case for the acquisition of streets by a municipality. In the Louisiana case the state courts placed a construction upon the state constitution which made the bonds valid; in the New York case the state courts placed a construction upon the act itself which made the streets exempt from elevated railroads. In both cases the plaintiff acquired property upon the faith of the law as thus interpreted, purchasing bonds in the Louisiana case, and real property in the New York case. In both cases the state legislature passed a second act, impairing the contract rights of the vendee of the property. In both cases the state courts then changed their former construction of the law, saying in the Louisiana case that the act which they first declared to be constitutional, was not constitutional, and saying in the New York case that the act which they first declared to be a bar to elevated railroads, was not a bar. In the Louisiana case this change of decision was adjudged by this court to be a violation of the supreme law of the land; and we respectfully submit that the same result must follow in the case at bar.

To the numerous cases cited in Louisiana *v.* Pilsbury, we shall add only one, Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. (U. S.) 416. In this

case it was said by Taney, C. J. (p. 432): "The duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

THIRD POINT.

The act in question, in providing for the erection of an elevated railroad in Fourth Avenue, is unconstitutional and void.

We have shown above that the evidence in this case establishes three contracts; that the obligation of each of these contracts, as construed by the New York courts, is that Fourth Avenue shall not be devoted to uses inconsistent with its character as an open public street; that an elevated railroad, according to the construction of the New York courts, is an inconsistent street use; and that this construction of the said contracts cannot, so

far as the plaintiff is concerned, be altered or modified by any change of judicial decision.

The remaining question is one which, in effect, has already been answered, namely, whether the obligation of these contracts has been impaired by Chapter 339 of the New York Laws of 1892, which provides for the erection and operation of an elevated railroad in Fourth Avenue.

The New York courts until recently have had but one answer for this question. In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 291, it was said: "Although it may be assumed that the municipality by proceedings, to open a street, acquires the fee to the land taken, it is yet a qualified fee, held in trust under the statute for a certain use, and that use cannot be departed from *without violating an essential condition of the contract under which the land was obtained.*" And on page 292: "The act of the legislature under which the defendant was organized, and from which its authority to take the property in question is claimed, if held to authorize an interference therewith without making compensation, is plainly obnoxious to the objection that it sanctions the taking of private property for public use, *and is also in conflict with that provision of the federal constitution prohibiting state legislatures from passing laws impairing the obligation of contracts.*"

In People *v.* Comrs., 53 Barb. (N. Y.) 70, 74, it was held that when the public authorities take the land of an individual for the purpose of a public highway, and pay the proprietor therefor, the transaction becomes a fixed contract between them, which is within the clause of the federal constitution forbidding the states to pass any law impairing the obligation of contracts.

The total lack of power in the legislature to abrogate the trust under which the City of New York

holds its streets, is stated at length in other New York cases.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 157, 160.
Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 291.
Kane *v.* N. Y. El. R. Co., 125 N. Y. 164, 183.
Williams *v.* N. Y. Cent. R. Co., 16 N. Y. 97, 108.
Trustees *v.* Auburn, etc., R. Co., 3 Hill (N. Y.) 567, 569.

And in very numerous other authorities it has been held that where land is dedicated to the public in trust for public purposes, the legislature has no power to abrogate the trust by devoting the land to inconsistent purposes, except upon making compensation.

Railroad Co. *v.* Schurmeir, 7 Wall. (U. S.) 272, 289-90.
U. S. *v.* Ill. Cent. R. Co., 2 Biss. (U. S.) 174, 181.
Packet Co. *v.* Sorrels, 50 Ark. 466, 473.
Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 172.
City of Jacksonville *v.* Jacksonville R. Co., 67 Ill. 540, 543.
City of Chicago *v.* Ward, 169 Ill. 392, 412.
Warren *v.* Mayor, 22 Iowa 351,356-7.
Franklin Co. *v.* Lathrop, 9 Kans. 453, 463.
Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 105; affd., 7 Wall. (U. S.) 272, 289.
City of St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 352.

Belcher Sugar Refining Co. *v.* St. Louis, etc., Co., 82 Mo. 121, 125-6.
Cummings *v.* City of St. Louis, 90 Mo. 259, 263-4.
State *v.* Laverack, 34 N. J. L. 201.
Trustees *v.* Mayor, 19 N. J. Eq. 355, 357.
Methodist Episcopal Church *v.* Penna. R. Co., 48 N. J. Eq. 452.
Le Clercq *v.* Gallipolis, 7 Ohio 217.
Board of Education *v.* Edson, 18 Ohio St. 221, 225.
Portland, etc., R. Co. *v.* City of Portland, 14 Oregon 188, 197.
Lamar Co. *v.* Clements, 49 Tex. 348.

In Railroad Co. *v.* Schurmeir, 7 Wall. (U. S.) 272, 289, it appeared that the owner of certain ground bordering on the Mississippi River and constituting a part of the city of St. Paul, surveyed, laid out, and platted the ground into blocks, streets, and lots, and caused the plat to be recorded. Under the local statute then in force, this act operated to vest the fee simple in the public for the uses named in the plat, and no other, the statute declaring that "land intended to be for streets, alleys, ways, commons, or other public use, * * * shall be held in the corporate name, in trust, to and for the uses and purposes set forth, and expressed or intended." On the plat an open space bordering on the river was designated as "Landing." The owner subsequently sold two lots fronting on this space to one Schurmeir. Thereafter a railroad company, under a grant from the legislature, began to construct a railroad over the said space. Schurmeir brought suit in the state court for an injunction, and obtained it. On appeal to the U. S. Supreme Court, this decree was affirmed, the court saying: "Attempt

is also made to justify the acts of the respondents, as grantees of the state, upon the ground that the complainant, in dedicating the premises to the public as a street, levee, and landing, parted with all his title to the same, and that the entire title vested in fee in the state. * * * Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defence to the suit, because it is nevertheless true that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

We add a few other cases in which the courts have held the obligation of a contract to be impaired.

In Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 565-6, it appeared that by a compact entered into between Virginia and Kentucky and sanctioned by Congress, it was provided "that the use and navigation of the River Ohio * * * shall be free and common to the citizens of the United States." Thereafter the legislature of Virginia passed an act under color of which the defendants constructed a bridge over the Ohio River. The suit was brought to enjoin the maintenance of this bridge on the ground that it was an obstruction to navigation. It was held that no state could violate the above compact by obstructing the navigation of the river, and that more than this was not necessary to give a civil remedy for an injury done by the obstruction.

In several other bridge cases it has been held that where a corporate franchise, amounting to a contract with the state, prohibits the erection of a

bridge within a certain locality, a subsequent act of the legislature which authorizes the erection of a bridge within the specified limits, impairs the obligation of the contract, and is unconstitutional.

Bridge Proprietors *v.* Hoboken Co., 1 Wall. (U. S.) 116, 144-5.
The Binghamton Bridge, 3 Wall. (U. S.) 51.

Finally, we add that this clause of the constitution is to receive a liberal construction. In Murray *v.* Charleston, 96 U. S. 432, 448, it was said: "There is no more important provision in the federal constitution than the one which prohibits states from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the constitution was framed."

FOURTH POINT.

The act in question is also unconstitutional in that it directs the taking of property without due process of law.

It is the law of New York that the owner of premises abutting on a public street has, as appurtenant to his premises, certain easements of light,

air, and access in the street; that these easements are property; and that the erection and operation of an elevated railroad in the street constitutes a taking of this property.

Story *v.* N. Y. El. R. Co., 90 N. Y. 122, 171, 179.
Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288-9.
Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505, 517.
Bohm *v.* Met. El. R. Co., 129 N. Y. 576, 587, per Peckham, J.
Sperb *v.* Met. El. R. Co., 137 N. Y. 155, 160.

In the case at bar it is conceded that the plaintiff has easements in Fourth Avenue. The trial court so found (Record, pp. 22-3), and the Appellate Division affirmed the finding. The Court of Appeals had no jurisdiction to review this question of fact, and did not attempt to do so. The opinion speaks of the "partial destruction" of these easements of light, air, and access (Record, p. 170, end), and thus concedes their existence. The Court of Appeals in a still later case has recognized the easements of the Fourth Avenue abutters, and, while denying a recovery for the main viaduct structure, has allowed damages for stations.

Dolan *v.* N. Y. & Harlem R. Co., 175 N. Y. 367.

Thus the Court of Appeals distinctly admits that the Park Avenue property owners possess the so-called urban easements in the avenue.

In the act in question we have a plain case of a statute which provides for the taking of the plaintiff's property, yet makes no provision for notice

to him, affords him no opportunity for a hearing, and contains not a syllable in reference to compensation for the property taken.

Notice, and a hearing of some kind, or an opportunity to be heard, are necessary elements of due process of law.

Roller *v.* Holly, 176 U. S. 398, 409.
Carson *v.* Brocton Sewerage Commission, 182 U. S. 398, 401.

So, also, after some doubt and uncertainty, it is now firmly established that an absolute requisite of due process of law is *compensation.*

Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 236, 241.
Tindal *v.* Wesley, 167 U. S. 204, 222-3.
Holden *v.* Hardy, 169 U. S. 366, 390-1.
Norwood *v.* Baker, 172 U. S. 269, 277.

It may be added, finally, that the prohibition in the Fourteenth Amendment, applies to all the instrumentalities of the state, to its legislative, executive, and judicial authorities.

Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 233-4.
Scott *v.* McNeal, 154 U. S. 34, 45.

FIFTH POINT.

Should the act in question be declared unconstitutional, no inequitable results would ensue.

The learned counsel for the defendants seem to think that if the act in question should be declared unconstitutional, the courts would be bound to order the removal of the viaduct, that the large sums expended upon it would be lost, that the trains of the defendants would cease running, and that incalculable inconvenience would result to the public.

But all that we claim, is, that this act is unconstitutional *as to this plaintiff* and others similarly situated. No one who has not a property interest to protect, can question it. In Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 316, it was said: "It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional, and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect."

See also Cooley, Constitutional Limitations (7th ed.), p. 250.

Under the execution of the laws, no one may cry out, unless he is hurt. The only persons who can complain of this statute are the plaintiff, and a comparatively few other property owners, whose rights have been impaired. As to such persons, it is the settled policy of the New York courts not to grant an absolute injunction. There has been a recent and striking instance of this. One of the elevated railroads in New York City constructed a

third track under a law which was subsequently held to be unconstitutional.

> Auchincloss *v.* Met. El. R. Co., 69 App. Div. (N. Y.) 63, 69.

After this decision, the property owner sought to obtain an absolute injunction, directing the removal of the third track. But the court refused to grant it, saying that the complete enforcement of the plaintiff's legal right would work hardship to the defendant and inconvenience to the public, while the plaintiff's injuries could be sufficiently compensated in money damages. And accordingly the court fixed the amount of the plaintiff's damages, and awarded merely the conditional injunction usual in elevated railroad cases.

> Auchincloss *v.* Met. El. R. Co., N. Y. Law Journal, July 11, 1903, p. 1342.

To the same effect is Knoth *v.* Manhattan R. Co., N. Y. Law Journal, November 17, 1904, p. 587.

The same result might be accomplished (as in the Story case, 90 N. Y. 122, 179) by suspending the injunction long enough to allow the defendants to acquire a right of way by agreement or by condemnation proceedings.

Thus it is clear that the only effect of declaring the act unconstitutional, would be to compel the defendants to compensate the plaintiff for the injuries done him; and it is certainly not inequitable that the defendants should pay for their right of way, whether that way be on the surface of the ground or in the air. The defendants are the owners of the viaduct (People *v.* Comrs., 101 N. Y. 322) and they should answer for all the damages that it causes.

If the situation is disagreeable to the railroad

companies, it is no more than they contracted for at the outset. They were content to accept a charter which provided that "the legislature may at any time alter, amend, modify, or repeal this act."

N. Y. Laws 1831, Ch. 263, § 18.

The legislature having exercised its reserved prerogative, the defendants cannot justly complain. But the plaintiff has never agreed that *his* rights should be subject to legislative control. And if some one must suffer, he certainly ought not to be the one.

SIXTH POINT.

The judgment under review should be reversed, and the case remanded.

ELIHU ROOT,
J. C. BUSHBY,
L. M. BERKELEY,
Of Counsel for Plaintiff in Error.

APPENDIX I.

EXTRACT FROM RIVER AND HARBOR ACT OF 1890 (U. S. STATS. AT LARGE, VOL. 26, P. 437).

"Improving Harlem River, New York: Continuing improvement, two hundred and fifty thousand dollars; and the Secretary of War is directed to cause the low bridges now crossing said Harlem River to be replaced by other bridges at the expense of the owners thereof as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges, thus required, to be made, the owners of said bridges being allowed a reasonable time in which to complete the work necessary for said approaches. Said bridges shall leave a clear space, between the under sides thereof and the high water of spring tides, of twenty-four feet, and shall be provided with draw-spans and draws of the width and length to be determined by the Secretary of War, and shall in all respects comply with this law and conform to the requirements of the Secretary of War: *Provided,* That the Secretary of War shall prescribe the times and regulations for the opening and operating of the draws in said bridges, but said draws shall not be opened except for vessels propelled by steam with or without vessels in tow; nor shall they be required to be opened at any times other than between ten o'clock in the forenoon and five o'clock in the afternoon."

APPENDIX II.

CHAPTER 339 OF THE NEW YORK LAWS OF 1892.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

APPROVED by the Governor, April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Change of Railroad Grade.

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly

ht the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

Existing Viaduct.

§ 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets. shall be adapted to the new grade line as established by the preceding section, by raising its parapet walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same

New Viaduct Structure.

of timber piling, or concrete, as may be found necessary.

Present Cut and Bridges.

§ 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry One Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

Refilling and Paving.

Height of New Viaduct.

§ 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the Harlem river, shall be passed over with a clear height of not less

than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section. [*As amended by Laws 1894, Ch. 548.*]

Streets to be Opened.

§ 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

Columns, how Placed and Size.

§ 6. The railroad tracks shall be carried on a solid, tight floor, and the drainage water shall be conducted by pipes into the sewers.

Drainage.

Station Houses and Platforms.

§ 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stairways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the center line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side side* of the said station building and between the curb on the* of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in

Sidewalks.

Columns for Support of same

* So in the original.

size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for. *(As amended by Laws 1896, Ch. 594.)*

Stairs.

Plan for Improvement Amended.

Power to Take down Structure.

§ 8. The Harlem River shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of

Bridge over Harlem River.

twenty-four feet above high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

Structure north of Harlem River.

§ 9. From the north abutment of the Harlem River bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eighth street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eighth street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

Change of Grades, 138th and 144th Streets.

§ 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eighth street, the grade level of One Hundred and Thirty-eighth street as now established,

shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eighth street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

Filling, 138th to 149th Streets.

§ 11. North of the north abutment of One Hundred and Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

Temporary Bridge and Use of Street.

§ 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river, and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, how-

ever, shall be done under the approval, direction and sanction of the board hereinafter appointed.

Board of Commissioners.

§ 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall

Duties of Commissioners.

be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The

Of whom Composed.

said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their

Vacancies.

successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and

Powers.

Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in con-

formity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

Contracts.

Salary of Commissioners.

Filing Plans, etc.

Oath of Office.

Supervision by Dept. of Public Works.

Inspectors and Engineers.

§ 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson River railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its

Cost and Payments.

lessee, the New York Central and Hudson River railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson River railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense. [*As amended by Laws 1894, Ch. 548.*]

§ 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper

Bonds to be Issued.

officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

How sold.

Commissioners of Assessment.

§ 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the

first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discreet and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties hereinafter mentioned in that behalf prescribed. Twenty day's notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine

Area of Assessment.

the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or* assessment. In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said

Report of Commissioners of Assessment.

*So in the original.

supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

Copy of Report to be Filed.

§ 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any

part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

§ 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

Quorum and Majority.

Compensation.

§ 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees, and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and

Assessment Liens.

against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners, without joining any other or others of them, the said parties or owners.

Payment of Bonds and Interest.

§ 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and county of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

§ 21. The new bridge over the Harlem river, authorized to be constructed by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem River Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of congress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

Bridge and Northerly Approaches to be paid for by R. R. Co.'s.

Approval of Sec'y of War.

§ 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

Amending Previous Acts and Contracts.

§ 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the State of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One Hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the State of New York, is hereby removed and annulled, anything in any act of the legislature of the State of New York, or in any contract made pursuant to any act of the said legislature of the State of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

City Ordinances.

§ 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense. to be recovered by said railroad corporation.

Use of Structure.

Cost of Stations.

§ 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad cor-

porations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

§ 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company, so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

Completion of Work and Use of same.

§ 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

Majority Vote Necessary.

§ 28. This act shall take effect immediately.

APPENDIX III.

STATEMENT BY THE COURT OF APPEALS OF NEW YORK IN THE LAHR CASE OF THE RULE OF PROPERTY AS ESTABLISHED IN THE STATE OF NEW YORK IN THE STORY CASE.

In Lahr *v.* Met. El. R. Co., 104 N. Y. 268, 288, it was said by Ruger, C. J.:

"We hold that the *Story Case* has definitely determined:

"*First.* That an elevated railroad, in the streets of a city, operated by steam power and constructed as to form, equipments and dimensions like that described in the *Story Case,* is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"*Second.* That abutters upon a public street claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property, shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over

such street for the benefit of property situated thereon.

"*Third.* That the ownership of such easement, is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

"*Fourth.* That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

APPENDIX IV.

LEWIS CASE, 162 N. Y. 202.

MARY J. LEWIS, Appellant and Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Respondents and Appellants, Impleaded with the NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant.

Lewis v. *N. Y. & H. R. R. Co.*, 40 App. Div. 343, affirmed.

(Argued January 25, 1900; decided February 27, 1900).

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1899, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages resulting from the operation of the defendants' railroad in front of plaintiff's premises on Park avenue, in the city of New York, and to enjoin the future operation of said railroad.

On the first of February, 1895, the plaintiff became the owner of a lot of land on the easterly side of Park, formerly Fourth, avenue, between 114th and 115th streets, in the city of New York, twenty-five feet wide and eighty feet deep. Upon this lot there is a five-story building known as No. 1613 Park avenue, the ground floor of which is used for stores, and the other floors for apartments. She derived her title to said premises through various mesne conveyances from one Benjamin L. Benson, who is the common source of title of all the parties to the controversy. On the 19th of April, 1897, she commenced this

action against the defendants for an injunction and damages on account of railroad structures erected and maintained in said avenue, which, as she alleged, interfered with access to her premises and prevented light and air from reaching the same.

In 1811 Park avenue was laid out as a street, 100 feet wide, under the name of Fourth avenue, upon a map filed by commissioners appointed pursuant to chapter 115 of the Laws of 1807, but for many years it had no existence except on paper. Said act made the map "in respect to the laying out of streets and roads within the boundaries" specified, final and conclusive, both upon the city and the landowners. It provided for the opening of any street so laid out upon the map whenever the city authorities decided to do so.

On the 19th of November, 1825, by a deed recorded December 6th of the same year, said Benson, who owned a large tract of farming land bounded by 107th and 115th streets and Third and Fourth avenues, conveyed to the city of New York the fee of Fourth avenue as laid out on said map, so far as it extended through his premises, including the portion in front of the lot now owned by the plaintiff, in trust for street purposes, reserving the timber, trees, buildings and improvements standing thereon, and covenanting with all convenient speed to open said avenue over the lands conveyed and make it passable for "horses, carriages, cattle and foot passengers in the same manner and with the same degree of convenience as good country roads are passable." It does not appear that this covenant was ever performed by him, or that the street was actually opened until after 1850.

On the 12th of November, 1828, Benson caused

a map of his tract to be filed in the register's office, upon which various lots were laid out, numbered and represented as lying on the easterly side of Fourth avenue. On the same day, by a deed recorded forthwith, he conveyed to one Watt, a predecessor in title of the plaintiff, the premises now belonging to her, with other lands, described by the lot numbers of said map and as bounded by the easterly exterior line of Fourth avenue.

The New York & Harlem Railroad Company was incorporated by chapter 263 of the Laws of 1831, and authorized "to construct a single or double railroad or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem River, between the east bounds of the Third Avenue and the west bounds of the Eighth Avenue," but in case the route should be located "in or along any public street or avenue now laid out on the map or plan of the city of New York," the company was required to "leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a sidewalk for foot passengers." The right was reserved to alter, amend or repeal the act at any time. The location of the route was not to be effective until a map thereof was approved by the common council. That approval was given on the 19th of December, 1831, by a resolution authorizing the company to construct a double or single-track railroad, not exceeding twenty-four feet in width, along Fourth avenue from Twenty-third street to the Harlem river, with the right, however, reserved to the city, in case "the railways or any part thereof shall constitute an obstruction or impediment to the future regulation of the city, or the ordinary use of any street or avenue," of which the city was to be the sole

judge, to require the company to forthwith provide a remedy for the same, and in case of its failure to do so within one month after such requisition, to require it to remove the railway and replace the street in as good condition as it was before the railway was laid down. In case the company neglected to obey, the city was given the right to remove the obstruction from the street and restore it to its former condition at the expense of the company. It was further provided that "the railroad path" should be protected by railings, and that if the railroad should be discontinued "the strip of land to be taken for the said railroad should be thrown open and become a part of the street." This resolution was embodied in a formal agreement, duly executed by the company. On the first of February, 1832, the common council, by resolution, authorized the company "to take possession of the ground owned by the common council over which the line of said railroad is ordered to be constructed, and that they be permitted to use the same" for railroad purposes only.

On the 18th of January, 1832, Benson conveyed to the company a central strip of land twenty-four feet wide, extending from 105th to 116th street, "being part of one of the avenues laid out on the map of the city of New York as the 4th avenue * * * for and during the full period of time" that it should remain a corporation, "and on which they are to construct their railroad and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the line of said premises * * * as may be necessary to support their work, not, however, extending beyond the width of the avenue," which was then one hundred feet. This deed was recorded August 18th, 1835, but prior thereto the company had constructed a

double-track railroad in the center of the avenue, on a stone viaduct, about twenty-eight feet wide at the base, with sloping walls, which, in front of the premises in question, were ten or twelve feet high.

In 1835 an effort was made to widen Fourth avenue to 140 feet, mainly because of the railroad in the center thereof. After action by the common council, upon the petitions of citizens and landowners interested, it was provided by chapter 274 of the Laws of 1837, entitled "An act to alter the map or plan of the city of New York," that "Fourth Avenue" should "be continued and extended on the said map or plan from 66th street to 68th street," and that "all that part of the Fourth avenue * * * lying between 34th street and the Harlem river shall be widened on the map or plan of the said city by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue 140 feet." The portion so to be widened was declared to be one of the avenues of the city, with the like effect as if it had been laid out under the act of 1807. Said act of 1837 discontinued parts of eight streets, and assumed that Fourth avenue was not yet opened, for it provided that "whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid in like manner as the same would have been done if the said avenues or streets had been originally so extended or continued."

Between 1850 and 1853 Fourth avenue was opened from 38th street to 135th, the additional twenty feet on each side having been condemned and a nominal award of one dollar made to the railroad company, but its possession of the central portion of the street was never disturbed, and the part then occupied by the com-

pany was never used as a public street until after 1892. There is no evidence that any part of the avenue in the vicinity of plaintiff's premises was ever built upon or used by teams until after 1850.

By chapter 702 of the Laws of 1872 said company was "authorized and required to regulate the grade of their railroad in the Fourth Avenue," and to make numerous changes by way of viaducts, bridges and tunnels in order to do away with grade crossings. Four tracks were authorized, and the grade was depressed a part of the way so that the tracks ran through a cut, but in front of the premises now belonging to the plaintiff a viaduct was required, which resulted in the construction of a solid stone embankment 56 feet 4 inches wide and 3 feet high, with a wall on each side extending up 3 feet and 10 inches farther. These changes were made by a board of engineers named in the act, who were required "to execute, direct and superintend the construction of the said improvement," and "take the entire charge and control" thereof. The cost of the improvement was to be paid by the railroad company and the city in equal proportions. The city officers were forbidden to obstruct the work; the municipal legislature was required to pass such ordinances as were necessary to facilitate the same, and the company was "authorized and directed to run" its trains over the structure "when completed."

This improvement was finished about 1873, as the trial court is presumed to have found, and during that year said company leased its railroad in Fourth, now Park avenue, to the New York Central & Hudson River Railroad Company for a term of 401 years, and the latter company has operated the same ever since.

In 1890 an act of Congress required the secretary of war "to cause the low bridges now cross-

ing said Harlem river to be replaced by other bridges at the expense of the owners thereof, as soon as the necessary legislation, if any such legislation be necessary, shall have enabled the change in grade to the approaches of said bridges thus required to be made." (26 U. S. Stat. at Large, 437.) In order to conform to this act no change of grade was required south of 125th street. In 1892 an act was passed, known as chapter 339, "to regulate, improve and enlarge Park Avenue;" "to provide for the passage of intersecting streets under the railroad structure of the New York & Harlem Railroad Company;" "for the elevation of said railroad structure;" "for changing the grade of said railroad;" "for the construction of a new railroad bridge at an increased elevation over the Harlem River. * * * and for other purposes." From the south side of 111th street to the river the railroad tracks were required to be carried on a viaduct of iron consisting of three lines of plate girders, supported by steel columns standing on suitable pedestals of masonry, with proper foundations. The structure was to be so built that all streets from 112th to the Harlem river should be passed over with a clear height of not less than 14 feet above the surface of the pavement. Various cross streets, including those nearest to the plaintiff's property, which did not then cross the railroad, were required to be opened, regulated and paved, and to pass under the viaduct. Three supporting columns were to divide the structure into spans of about sixty-five feet, with one column in the center and another on each side at a distance not exceeding 28 feet. The columns were not to be more than 24 inches through, which was to be their "extreme external diameter above the level of the street pavement." The railroad tracks, four being authorized, were to be carried on a solid, tight, iron floor, and the

drainage water conducted by pipes into sewers. Many other changes were required, during the making of which temporary structures were authorized in the avenue for the operation of the railroad. All the work, including that last named, was to be done by a board appointed by the mayor, which was directed to take the entire charge and control of the improvement, and to execute it in conformity with the act, one-half of the expense to be paid by the companies and the other half by the city, but the amount of the latter was to be assessed upon the property benefited. The defendants were "authorized and directed" to run their trains on the structure "when completed."

Pursuant to this act work was begun in August, 1894. The stone embankment was taken away and the viaduct constructed within the lines of the old structure, at a height above the street of about 35 feet and a width of 56 feet and 2 inches. The effect was to raise the trains high in the air and to remove the former obstruction from the avenue, which is now graded, paved and used as a street, 140 feet wide, with cross streets no longer cut in two. The whole avenue is open to traffic, except where the columns stand, and all the lateral streets, including 114th and 115th, extend across without obstruction. While the permanent structure was in course of erection, provision was made by said board, pursuant to the act, for the running of trains by the erection of temporary trestles on each side of the old stone structure of 1872. These trestles were 3 feet high, about 13 feet 7 inches wide, and the total width of the old structure and the two trestles about 85½ feet. They were built primarily for the operation of trains, and secondarily to aid in erecting the permanent structure. All the work of construction, both temporary and permanent, was done by the board appointed by

the mayor, and neither defendant participated in the erection, or did anything, except in subordination to the board, which had exclusive control. The trains were transferred to the trestles in September, 1894, and were run thereon until February 16th, 1897, when they were removed to the new steel viaduct, upon which they have been operated ever since. The new structure, as compared with the old, confers no additional advantage upon the defendants. Between four and five hundred trains run over this structure every twenty-four hours, some of them in the night time, at from twenty to twenty-five miles an hour. The plaintiff purchased her lot while the work was in progress, and commenced this action shortly after the completion thereof.

The trial judge found that the defendants, by virtue of the various acts above named, the resolutions and action of the city, the Benson deed of January 18th, 1832, the street opening proceedings "commenced in 1850 and consummated in 1853, * * * and all acts of acceptance, user and occupation on the part of the defendant railroad companies, and the lapse of time and the acquiescence of the plaintiff or her predecessors in title, acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894." He also found that "the rental and fee values of the plaintiff's premises were damaged by the work of constructing said permanent structure, and by the existence of the same prior to said date (when the trains began to run thereon), but neither of the said defendants is liable for such damage. The said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been, a continuous trespass upon the

plaintiff's easements of light and air, appurtenant to her said premises, and solely in consequence of said trespass, and aside from any other causes, the rental or usable value of said premises was depreciated from said date down to May 9th, 1898, in the sum of $100, below what said rental value would have been during said period, if there had been no change in defendant's said railroad in Park avenue in front of said premises, pursuant to chapter 339 of the Laws of 1892, and the fee value of said premises had been, and was on May 9th, 1898, depreciated in the sum of $750 below what said fee value would have been on said date if there had been no change in defendants' railroad as aforesaid. The said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and in great measure offset the damages to said premises caused by said changes. The said sums awarded as damages are exclusive of any damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendants' railroad and structures, had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages, if any, the defendants are not responsible either jointly or severally." It was further found that "the existence of the temporary structure in front of plaintiff's premises, during said period, and the operation of trains thereon, deprived the plaintiff to a great extent of the light and air and access to which she was entitled, without any corresponding benefit, and the rental or usable value of her premises was damaged thereby in the sum of $600, which sum

she is entitled to recover, with interest from February 16th, 1897; but the said defendant is liable for the presence and use of said temporary structure only during the time its trains were operated thereon."

The trial court held that the defendants were not liable for the erection, maintenance or use of the old stone structure, or for the erection of the new steel or temporary wooden structures, but that they were liable for the actual use of the temporary trestles and for the net difference in the effect of using the old and the new structures, after taking into account the increased facilities for access. The liability of the defendants was thus limited to damages caused by the presence of the temporary and permanent structures, so long only as they were in actual use by them.

From the usual judgment entered accordingly both parties appealed to the Appellate Division, where the judgment was affirmed, one of the justices dissenting upon the ground that the plaintiff had sustained no permanent damage by reason of the new erection, as the old structure was a greater detriment to her premises than the new. Both parties appealed to this court.

J. C. Bushby and *L. M. Berkeley* for plaintiff, appellant and respondent.

Henry G. Atwater and *J. C. Thomson* for Alice I. Birrell and others, intervening.

Ira A. Place, Samuel E. Williamson and *Alexander S. Lyman* for defendants, respondents and appellants.

VANN, J. The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of

the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Company, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands (Code Civ. Pro. § 369; *Baker* v. *Oakwood*, 123 N. Y. 16).

The situation, when the Harlem Company entered Fourth avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and

had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474).

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro. §368; Code Pro. §81; 2 R. S. 293, §8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the intention with which entry is made and occupation continued. There is no disseisin until there is occupation

with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title (*Brandt* v. *Ogden*, 1 Johns. 156; *Smith* v. *Burtis*, 6 Johns. 197; *Jackson* v. *Johnson*, 5 Cow. 74; *Jackson* v. *Brink*, 5 Cow. 483; *La Frombois* v. *Jackson*, 8 Cow. 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend. 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y. 646; *Kneller* v. *Lang*, 137 N. Y. 589; *DeLancey* v. *Piepgras*, 138 N. Y. 26; *Heller* v. *Cohen*, 154 N. Y. 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss. 380; Am. & Eng. Encyc. of Law [2nd ed.], 778).

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and, as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company

expressly convenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street whenever the city required it. It entered under a license and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon its deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y. 458.) The city did not know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a landowner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora* v. *Carbean*, 38 N. Y. 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y. 263; *Parker* v. *Foote*, 19 Wend. 313.) When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest

purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure, while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision upon grounds equally tenable in

either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 133 N. Y. 341, 345; *Lord* v. *Atkins*, 138 N. Y. 184, 191; *Haight* v. *Littlefield*, 147 N. Y. 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 to 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the

courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff* v. *Paddock*, 130 N. Y. 618, 624; *Snell* v. *Levitt*, 110 N. Y. 595; *Nicholls* v. *Wentworth*, 100 N. Y. 455; *Ward* v. *Warren*, 82 N. Y. 265; *Parker* v. *Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements (4th ed.). 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, §160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell* v. *Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of

her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co.* v. *N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice* v. *Geiger*, 74 N. Y. 341; *Baldwin* v. *Calkins*, 10 Wend. 169; *Bealy* v. *Shaw*, 6 East, 208; *Stiles* v. *Hooker*, 7 Cow. 266). As was said by Judge ANDREWS in *Prentice* v. *Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater* v. *Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The

board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y.. 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R. R.* v. *Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way

and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass upon the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As

to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced. Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohm* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R. R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to

abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R. R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R. R. Co.*, 28 App. Div. 379 and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R. R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R. R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

PARKER, Ch. J., BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

APPENDIX V.

FRIES CASE, 169 N. Y. 270.

GUSTAV R. FRIES, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants.

Fries v. *N. Y. & Harlem R. R. Co.*, 57 App. Div. 577, reversed.

(Argued April 19, 1901; decided December 31, 1901.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Ira A. Place, Samuel E. Williamson and *Alexander S. Lyman* for appellants.

Joseph A. Flannery for respondent.

O'BRIEN, J. The plaintiff is the owner of a three-story frame building on Park avenue, at the southwest corner of 129th Street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default

of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the centre of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said

railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this

improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a tresspasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the improvement for which the railroad was not responsible.' The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to

the abutter in such cases, is held to be *damnum absque injuria. (Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. *(Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dist.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423). The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. *(Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of

the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603). The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February, 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned

trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation proceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first place, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be controlled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties ap-

pealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the state under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice.

The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner stone and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover. (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y. 559; *Hine* v. *N. Y. El. R. R. Co.*, id. 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id. 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id. 393).

It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and

Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J. Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, Ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if

done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an action for its consequences whatever they may be, unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff, or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute. These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R. R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R. R. Co.*

(50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R. Co.* (101 id. 98, 107); *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R. R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot v. N. Y. & H. R. R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases. While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them

to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of the viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'BRIEN, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

CULLEN, J. (dissenting). I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R. R. Co.*, 151 id. 155.) 2. That

the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R. R. Co.*, 50 N. Y. 206; *Fobes* v. *R., W. & O. R. R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appropriation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y., L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discus-

sion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn.* That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he is entitled to compensation. To relieve the defendant from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y. 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In the *Conabeer* case the trial court found as a matter

of fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the maintenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right ac-

quired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

APPENDIX VI.

KEIRNS CASE, 173 N. Y. 642.

JOHN KEIRNS, Respondent, *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY et al., *Appellants.*

Keirns v. *N. Y. & Harlem R. R. Co.*, 60 App. Div. 630, reversed.
(Argued November 18, 1902; decided February 24, 1903).

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 7, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Ira A. Place, Alexander S. Lyman and *Thomas Emery* for appellants.

Alfred B. Cruikshank, Henry G. Atwater and *John C. Thomson* for respondent.

Per Curiam. Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R. R. Co.* (169 N. Y. 270), and *Muhlker* v. *N. Y. & Harlem R. R. Co.* (173 N. Y. 549).

VANN, J. (concurring). The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R. R. Co.*, 162 N. Y. 202). The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was

discovered by a majority of the court that was not raised by counsel or considered by us in the former case (*Fries* v. *N. Y. & Harlem R. R. Co.*, 169 N. Y. 270).

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the company's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that

case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker* v. *N. Y. & Harlem R. R. Co.*, 173 N. Y. 549).

I concurred in the dissenting opinion of Judge CULLEN in the *Fries* case and should have concurred in that of Judge Bartlett in the *Muhlker* case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and WERNER, JJ. (and VANN, J., in memorandum), concur; GRAY, J., not sitting.

Judgment reversed, etc.